

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

ROBERT KENNY,

Plaintiff,

v.

PACIFIC INVESTMENT MANAGEMENT  
COMPANY LLC, a Delaware limited liability  
company; PIMCO INVESTMENTS LLC,

Defendants.

No. 2:14-cv-01987-RSM

AGREEMENT REGARDING  
DISCOVERY OF ELECTRONICALLY-  
STORED INFORMATION AND  
[PROPOSED] ORDER

The parties hereby stipulate to the following provisions regarding the discovery of electronically-stored information (“ESI”) in this matter:

**A. General Principles**

1. An attorney’s zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

2. The proportionality standard set forth in Fed. R. Civ. P. 26(b)(2)(C) must be applied in each case when formulating a discovery plan. To further the application of the

AGREEMENT REGARDING DISCOVERY OF ESI AND ORDER  
(2:14-cv-01987-RSM) - 1

**KELLER ROHRBACK L.L.P.**

1201 Third Avenue, Suite 3200  
Seattle, Washington 98101-3052  
TELEPHONE: (206) 623-1900  
FACSIMILE: (206) 623-3384

1 proportionality standard in discovery, requests for production of ESI and related responses  
2 should be reasonably targeted, clear, and as specific as possible.

3 **B. ESI Disclosures**

4 Within 15 days after the filing of this Agreement, or at a later time if agreed to by the  
5 parties, each party shall disclose:

6 1. Custodians. A list of the most likely custodians of relevant documents and/or ESI.  
7 The custodians shall be identified by name, title, connection to the instant litigation, and the type  
8 of the information under his/her control.

9  
10 2. Non-custodial Data Sources. A list of non-custodial data sources (e.g. shared  
11 drives, servers, databases, document management systems, e-rooms, etc.), if any, likely to  
12 contain discoverable ESI.

13 3. Third-Party Data Sources. A list of third-party data sources, if any, likely to  
14 contain discoverable ESI (e.g. third-party email and/or mobile device providers, “cloud” storage,  
15 etc.) and, for each such source, the extent to which a party is (or is not) able to preserve  
16 information stored in the third-party data source.

17  
18 4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI  
19 (by type, date, custodian, electronic system or other criteria sufficient to specifically identify the  
20 data source) that a party asserts is not reasonably accessible under Fed. R. Civ. P. 26(b)(2)(C)(i).

21 **C. Preservation of ESI**

22 The parties acknowledge that they have a common law obligation to take reasonable and  
23 proportional steps to preserve discoverable information in the party’s possession, custody or  
24 control. With respect to preservation of ESI, the parties agree as follows:  
25  
26

1           1.       Absent a showing of good cause by the requesting party, the parties shall not be  
2 required to modify the procedures used by them in the ordinary course of business to back-up  
3 and archive data; provided, however, that the parties shall preserve all discoverable ESI in their  
4 possession, custody or control.

5           2.       All parties shall supplement their disclosures in accordance with Rule 26(e) with  
6 discoverable ESI responsive to a particular discovery request or mandatory disclosure where that  
7 data is created after a disclosure or response is made (unless excluded under (C)(3) or (D)(1)-(2)  
8 below).

9           3.       Absent a showing of good cause by the requesting party, the following categories  
10 of ESI need not be preserved:

11                   A.       Deleted, slack, fragmented, or other data only accessible by forensics.

12                   B.       Random access memory (RAM), temporary files, or other ephemeral data  
13 that are difficult to preserve without disabling the operating system.

14                   C.       On-line access data such as temporary internet files, history, cache,  
15 cookies, and the like.

16                   D.       Data in metadata fields that are frequently updated automatically, such as  
17 last-opened dates (see also Addendum, *infra*).

18                   E.       Back-up data that are substantially duplicative of data that are more  
19 accessible elsewhere.

20                   F.       Server, system or network logs.

21                   G.       Data remaining from systems no longer in use that is unintelligible on the  
22 systems in use (the parties agree to meet and confer on any systems with unintelligible  
23 relevant data to be deleted or excluded from search and production).  
24  
25  
26

H. Electronic data (e.g. email, calendars, contact data, and notes) sent to or from mobile devices (e.g., iPhone, iPad, Android, and Blackberry devices), provided that a copy of all such electronic data is routinely saved elsewhere (such as on a server, laptop, desktop computer, or “cloud” storage).

#### **D. Privilege**

1. With respect to privileged or work-product information generated after the filing of the complaint, parties are not required to include any such information in privilege logs.

2. Activities undertaken in compliance with the duty to preserve information are protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

3. Information produced in discovery that is protected as privileged or work product shall be immediately returned to the producing party, and its production shall not constitute a waiver of such protection, if: (i) such information appears on its face to have been inadvertently produced or (ii) the producing party provides notice within 15 days of discovery by the producing party of the inadvertent production.

#### **E. ESI Discovery Procedures**

1. On-site inspection of electronic media. Such an inspection shall not be permitted absent a demonstration by the requesting party of specific need and good cause or by agreement of the parties.

2. Search methodology. The parties shall timely attempt to reach agreement on appropriate search terms, or an appropriate computer- or technology-aided methodology, before any such effort is undertaken. The parties shall continue to cooperate in revising the appropriateness of the search terms or computer- or technology-aided methodology.

1 In the absence of agreement on appropriate search terms, or an appropriate computer- or  
2 technology-aided methodology, the following procedures shall apply:

3 A. A producing party shall disclose the search terms or queries, if any, and  
4 methodology that it proposes to use to locate ESI likely to contain discoverable  
5 information. The parties shall meet and confer to attempt to reach an agreement on the  
6 producing party's search terms and/or other methodology.

7 B. If search terms or queries are used to locate ESI likely to contain  
8 discoverable information, a requesting party is entitled to no more than 5 additional terms  
9 or queries to be used in connection with further electronic searches absent a showing of  
10 good cause or agreement of the parties. The 5 additional terms or queries, if any, must be  
11 provided by the requesting party within 14 days of receipt of the producing party's  
12 production.

13 C. Focused terms and queries should be employed; broad terms or queries,  
14 such as product and company names, generally should be avoided. Absent a showing of  
15 good cause, each search term or query returning more than 250 megabytes of data are  
16 presumed to be overbroad, excluding Microsoft PowerPoint files, image and audio files,  
17 and similarly large file types.

18 D. The producing party shall search both non-custodial data sources and ESI  
19 maintained by the custodians identified above.

20 3. De-duplication. The parties may de-duplicate their ESI production across  
21 custodial and non-custodial data sources after disclosure to the requesting party. For email de-  
22 duplication, the parties will use the MD5 hash comparison and will generate the hash value from  
23  
24  
25  
26

the following email meta fields: (1) Subject; (2) From/Author; (3) Attachment Count; (4) Email Sent Date and Time; (5) Body; (6) Recipients/To; (7) CC; and (8) BCC.

4. Nothing in this Order will preclude the parties from proposing additional custodians and/or search terms or queries based on newly obtained discovery or information. The parties will continue to meet and confer regarding any search process issues as necessary and appropriate. This ESI protocol does not address or resolve any other objection to the scope of the parties' respective discovery requests.

5. The parties agree that documents responsive to requests for production are not limited to those identified by the ESI discovery procedures in this Agreement. The parties further agree that the production of ESI is not the exclusive means of responding to requests for production served in this action.

**F. Format of Production**

With regard to the format of any production of ESI and related production matters, the parties agree to all of the provisions set forth in the Addendum to this Agreement.

DATED: November 19, 2015

Attorneys for Plaintiff:

/s/ Michael D. Woerner

Michael D. Woerner, WSBA #15452  
Tana Lin, WSBA #35271  
Laura R. Gerber, WSBA #34981  
Ian Mensher, WSBA #39593  
KELLER ROHRBACK L.L.P.  
1201 Third Avenue, Suite 3200  
Seattle, WA 98101  
Telephone: (206) 623-1900

Email: mwoerner@kellerrohrback.com  
tlin@kellerrohrback.com  
lgerber@kellerrohrback.com

AGREEMENT REGARDING DISCOVERY OF ESI AND ORDER  
(2:14-cv-01987-RSM) - 6

**KELLER ROHRBACK L.L.P.**

1201 Third Avenue, Suite 3200  
Seattle, Washington 98101-3052  
TELEPHONE: (206) 623-1900  
FACSIMILE: (206) 623-3384

imensher@kellerrohrback.com

Michael Brickman (*Admitted Pro Hac Vice*)  
RICHARDSON, PATRICK, WESTBROOK  
& BRICKMAN, LLC  
174 East Bay Street  
P.O. Box 879  
Charleston, SC 29401  
Telephone: (843) 727-6520  
Email: mbrickman@rpwb.com

James C. Bradley (*Admitted Pro Hac Vice*)  
Nina Fields Britt (*Admitted Pro Hac Vice*)  
RICHARDSON, PATRICK, WESTBROOK  
& BRICKMAN, LLC  
1017 Chuck Dawley Blvd.  
Post Office Box 1007  
Mount Pleasant, SC 29465  
Telephone: (843) 727-6500  
Email: jbradley@rpwb.com  
nfields@rpwb.com

Attorneys for Defendants:

/s/ Robert A. Skinner

Robert A. Skinner (*Admitted Pro Hac Vice*)  
John D. Donovan, Jr. (*Admitted Pro Hac Vice*)  
Amy D. Roy (*Admitted Pro Hac Vice*)  
ROPES & GRAY LLP  
Prudential Tower  
800 Boylston Street  
Boston, MA 02199  
Telephone: (617) 951-7000  
Email: Robert.Skinner@ropesgray.com  
John.Donovan@ropesgray.com  
Amy.Roy@ropesgray.com

John C. Ertman (*Admitted Pro Hac Vice*)  
ROPES & GRAY LLP  
1211 Avenue of the Americas  
New York, NY 10036-8704  
Telephone: (212) 596-9000

1 Email: John.Ertman@ropesgray.com

2 Ronald L. Berenstein  
3 David F. Taylor  
4 Sean C. Knowles  
5 PERKINS COIE LLP  
6 1201 Third Avenue, Suite 4900  
7 Seattle, WA 98101-3099  
8 Telephone: (206) 359-8000  
9 Email: rberenstein@perkinscoie.com  
10 dftaylor@perkinscoie.com  
11 sknowles@perkinscoie.com;

8 **ORDER**

9 Based on the foregoing, IT IS SO ORDERED.

10 DATED: \_\_\_\_\_

12 \_\_\_\_\_  
13 The Honorable Ricardo S. Martinez  
14 United States District Court Judge



## II. ELECTRONICALLY STORED INFORMATION PRODUCTION FORMAT

The parties agree that all ESI is to be produced in an “imaged” file with the corresponding “image load/unitization files,” “OCR or Extracted text files,” and the “associated delimited metadata database.” Additionally, the parties specify that select files should be produced in their native file format where an image file does not adequately represent the files as maintained in the ordinary course (often this relates to spreadsheet files). The key concepts are explained below.

1. **Native:** Microsoft Access files, Excel files, .CSV files, other similar databases and spreadsheet files, and media files shall be produced in the format which the electronically stored information was originally created. Native Files will be produced together with a placeholder TIFF image. Each TIFF placeholder will contain language indicating that the document is being produced in native format. A relative file path to the native file shall be provided in the metadata database as described in item 5. To the extent the requesting party obtains through discovery a file or document that it believes is not adequately represented in an image file format, it may request that file or document be produced in native format, the production of which may not unreasonably be withheld.

2. **Imaged File:** a TIFF image converted from the native file as it was originally created;

a. All images shall be 1 Bit group4 black and white TIFF files (except when color images are required to read or understand the file/document’s content; all color images shall be produced as a JPEG file);

b. Hidden content, tracked changes or edits, comments, notes, and other similar information viewable within the native file shall also be imaged so that such content is

viewable on the image;

c. Bates numbers shall be branded to the images so that the numbers print;

d. Images shall be single page image files (one file for each page of a document).

3. **Image Load/Unitization Files:** An image load/unitization file in a standard .opt or .log litigation support image load format shall be included which provides:

a. the document number for each image;

b. the full path name(s) of each image file;

c. the document boundaries for each document;

d. the load file shall be in the order that appropriately corresponds with each image file;

e. the following represents the format of a standard .opt or .log image load/unitization file:

Bates,Volume,PATH\_to\_image,Document Break,Folder Break,Box Break,Total\_Pages.

M\_0100000,06150101,\06150101\0000\0001.TIF,Y,,,1  
M\_0100001,06150101,\06150101\0000\0002.TIF,Y,,,1  
M\_0100002,06150101,\06150101\0000\0003.TIF,Y,,,1  
M\_0100003,06150101,\06150101\0000\0004.TIF,Y,,,2  
M\_0100004,06150101,\06150101\0000\0005.TIF,,,,,  
M\_0100005,06150101,\06150101\0000\0006.TIF,Y,,,1  
M\_0100006,06150101,\06150101\0000\0007.TIF,Y,,,4  
M\_0100007,06150101,\06150101\0000\0008.TIF,,,,,  
M\_0100008,06150101,\06150101\0000\0009.TIF,,,,,  
M\_0100009,06150101,\06150101\0000\0010.TIF,,,,,

1           4.     **OCR or Extracted Text File:** An OCR or Extracted text file which corresponds  
2 to each produced document shall be provided as follows:

3                 a.     Document level OCR text for redacted documents or Extracted text for  
4 ESI not containing redaction are to be located in the same directory as its image file;

5                 b.     The text file name shall be the same name of the first image page for the  
6 document set, followed by .txt.

7                 c.     An OCR or Extracted text file containing the produced document's  
8 content will be provided for all documents whether it is produced as an image file or natively.  
9

10           5.     **Associated delimited metadata database:** A database shall be provided in a  
11 “.dat” file format that extracts metadata into fields in a delimited text load file. For the  
12 Concordance .dat, the parties should use Concordance standard delimiters (ASCII 020  
13 corresponding to a comma, ASCII 254 corresponding to a double quote, ASCII 174  
14 corresponding to a new line, and a semicolon used to separate values). The fielded data should  
15 include all the below metadata fields for a file/document in addition to the unitization (including  
16 the production number of the first and last page of each document) and attachments (including  
17 information sufficient to identify the parent and child relationships of all documents that are or  
18 have attachments). The first line of the data load file should contain the field headers indicating  
19 the contents of each field, and each subsequent line should contain the fielded data for each  
20 document.  
21  
22  
23  
24  
25  
26

FIELD NAME	FIELD DESCRIPTION	APPLICABLE FILE TYPE(S)
BEGBATES	Beginning production number for a given file/document	Email, E-Doc and Other <sup>1</sup>
ENDBATES	Ending production number for a given file/document	Email, E-Doc and Other
BEGATTACH	Production number of first page of parent	Email, E-Doc and Other
ENDATTACH	Production number of last page of last attachment	Email, E-Doc and Other
CUSTODIANS	All custodians whose files contained a particular document that was produced or eliminated through de-duplication	Email, E-Doc and Other
FILEEXT	File extension	Email and E-Doc
HASH	MD5 Hash Value	E-mail and E-Doc
SUBJECT	Subject	E-mail
FROM	Sender	E-mail
TO	Recipient	E-mail
CC	Copyee	E-mail
BCC	Blind Copyee	E-mail
DATESENT	Date Sent & Time (MM/DD/YYYY HH:MM)	E-mail
DATERECEIVED	Date Received & Time (MM/DD/YYYY HH:MM)	E-mail
AUTHOR	Author	E-Doc
DATELASTMOD	Date modified & Time	E-Doc

<sup>1</sup> Other is defined as documents for which internal metadata is not exchanged, including but not limited to, scanned documents and documents obtained from the internet.

FIELD NAME	FIELD DESCRIPTION	APPLICABLE FILE TYPE(S)
	(MM/DD/YYYY HH:MM)	
DATECREATED	Date created & Time (MM/DD/YYYY HH:MM)	E-Doc
ITEMTYPE	Identifies whether the file is an email, attachment to email, or loose edoc	E-mail and E-Doc
FILENAME	Original file name	E-Doc
FILEPATH	Original file path to the file or e-mailbox folder structure	E-mail and E-Doc
NATIVEFILE	Path to native file as produced	Native
TEXTPATH	Path to OCR or extracted text file	E-mail, E-Doc and Other

**CERTIFICATE OF SERVICE**

I hereby certify that on November 19, 2015, I electronically filed the

**AGREEMENT REGARDING DISCOVERY OF ELECTRONICALLY-STORED  
INFORMATION AND [PROPOSED] ORDER**

with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the email addresses registered, as denoted on the attached list, and I hereby certify that I have caused to be mailed the foregoing document or paper via the United States Postal Service to non CM/ECF participants on the list below:

Ronald L Berenstein rberenstein@perkinscoie.com, docketsea@perkinscoie.com,  
jstarr@perkinscoie.com

Michael Woerner mwoerner@KellerRohrback.com, dwilcher@kellerrohrback.com

David F Taylor DFTaylor@perkinscoie.com, docketsea@perkinscoie.com,  
kstokes@perkinscoie.com

Robert A Skinner rskinner@ropesgray.com

Tana Lin tlin@kellerrohrback.com, chopkins@kellerrohrback.com,  
ldouglas@kellerrohrback.com

Laura R Gerber lgerber@kellerrohrback.com, sdouglas@kellerrohrback.com

Sean C Knowles sknowles@perkinscoie.com, docketsea@perkinscoie.com,  
kstokes@perkinscoie.com

Ian J. Mensher imensher@kellerrohrback.com

Michael J Brickman mbrickman@rpwb.com

Nina Fields Britt nfields@rpwb.com

James C Bradley jbradley@rpwb.com

Matthew A Nickles mnickles@rpwb.com

AGREEMENT REGARDING DISCOVERY OF ESI AND ORDER  
(2:14-cv-01987-RSM) - 14

**KELLER ROHRBACK L.L.P.**

1201 Third Avenue, Suite 3200  
Seattle, Washington 98101-3052  
TELEPHONE: (206) 623-1900  
FACSIMILE: (206) 623-3384

1 John D Donovan, Jr John.Donovan@ropesgray.com

2 John C Ertman John.Ertman@ropesgray.com

3 Amy D Roy Amy.Roy@ropesgray.com

5 /s/ Michael D. Woerner

6 Michael D. Woerner, WSBA #15452

26 AGREEMENT REGARDING DISCOVERY OF ESI AND ORDER  
(2:14-cv-01987-RSM) - 15

**KELLER ROHRBACK L.L.P.**

1201 Third Avenue, Suite 3200  
Seattle, Washington 98101-3052  
TELEPHONE: (206) 623-1900  
FACSIMILE: (206) 623-3384